Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 75-319

WALTER J. CUKROWSKI, HELEN G. CUKROWSKI and KATHLEEN CUKROWSKI,

Petitioners,

v.

MT. SINAI HOSPITAL, INC., DR. RICHARD L. FRANKLIN, DR. IRVIN M. BECKER, DR. WALTER HOGAN, DR. PHILLIP S. GUZELIAN, DR. HERBERT A. OXMAN, and DR. HENRY M. GOLDBERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

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August 1975

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MT. SINAI HOSPITAL, INC., DR. RICHARD L. FRANKLIN, DR. IRVIN M. BECKER, DR. WALTER HOGAN, DR. PHILLIP S. GUZELIAN, DR. HERBERT A. OXMAN, and DR. HENRY M. GOLDBERG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

Petitioners, Walter J. Cukrowski, Helen G. Cukrowski and Kathleen Cukrowski, pray that a writ of certiorari issue to review an opinion and judgment thereon of the Supreme Court of Wisconsin in the above-entitled case. The opinion and order of the Supreme Court of Wisconsin were rendered on March 28, 1975, with judgment entered thereon on April 28, 1975; and

reported at 67 Wis. 2nd, 487, ____ N.W. 2nd ____; rehearing was denied without opinion and with costs on June 3, 1975 and inserted in judgment entered thereon on June 23, 1975. The opinion is printed as Appendix A hereto.

OPINIONS BELOW

The court below affirmed a judgment of the Circuit Court of Milwaukee County entered July 10, 1973, which is unreported. There was no written opinion. The order for judgment and judgment is printed as Appendix C.

JURISDICTION

Supreme Court of Wisconsin included an opinion (Appendix A) which was rendered March 28, 1975, the judgment thereon which was entered April 28, 1975, the rehearing which was denied with costs on June 3, 1975 (Appendix B) and judgment entered thereon June 23, 1975, respectively. The jurisdiction of this court is invoked under 28 U.S. Code 1257 (3).

QUESTIONS

1.

Were not the parent-petitioners denied due process of law and equal protection of the laws when they were forced to trial unprepared, after having proceeded in the only manner financially available to them?

QUESTION 2.

Were not the parent-petitioners' due process and equal protection rights violated when the trial court ordered their medical malpractice case to trial and that they "shall not call any expert witnesses"; and further, denied them the benefit of their state court's abrogation just two months prior to the "locality rule" pertaining to expert witnesses?

QUESTION 3.

Was one of your petitioners denied due process and equal protection of the laws when the lower appellate court refused to review on timely appeal a lower court judgment on order sustaining demurrer to her complaint, which dismissed her case on the merits, contrary to then existing substantive law; the law of state providing for appeal as a matter of right?

QUESTION 4.

Were not the lower courts' judgment and affirmance, nothing more than an unconstitutional extension of Powers v. Allstate, 10 Wis. 2nd 78, 102 N.W. 2nd 393, to-wit, the denial before trial of a trial to a litigant who chooses to reject what the court might consider to be a reasonable offer?

QUESTION 5.

Does the failure of the lower appellate court to present in its opinion facts of unquestioned importance, fully presented by both sides, so vitiate its opinion as to call for an exercise of this court's power of supervision?

STATUTES INVOLVED

The pertinent portions of the statutes involved in this case are:

Article VII United States Constitution:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Article XIV, Sec. 1, United States Constitution:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article VII, Sec. 20, Wisconsin Constitution, Wisc. Stat. Vol. 1, Page 49, 1973 Ed.:

"Rights of suitors. Section 20. Any suitor, in any court of this state, shall have the right to

prosecute or defend his suit either in his own proper person, or by an attorney or agent of his choice."

270.54 Wisc. Stat. Vol. 2, Page 3392, 1973 Ed.:

"... The Court may also dismiss the complaint, with costs, in favor of one or more defendants in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants or to proceed in the cause against the defendant or defendants served. ..."

274.01 Wisc. Stat. Vol. 2, Page 3420, 1973 Ed.:

"274.01 Supreme court; writs of error and appeals; when taken. (1) Except as otherwise provided the time within which a writ of error may be issued or an appeal taken to obtain a review by the supreme court of any judgment or order in any civil action or special proceeding in a court of record is limited to 3 months from service of notice of entry of such judgment or order or, if no notice is served, to 6 months from date of entry. ..."

STATEMENT OF CASE–FACTS.

This case involves a family–father–mother and teen-age daughter, where the patriarch suffered from an act of medical malpractice in 1967. By late 1969 he had recovered enough after $75,000 in unsubrogated Blue Cross bills, to find and hire the only lawyer who would take his case, due to its complexities; but the employment was on a contingent fee, as he had no money, and he agreed to conditions by his lawyer that the job be spread over a period of time, as the lawyer had to maintain his practice and income from other matters.

The action commenced February, 1970 and was filed February, 1971.

In September, 1972, the trial court sustained a demurrer to the cause of action of the daughter-petitioner.

A litany of lack of cooperation between counsel for the defendants among themselves and they with plaintiffs' counsel as to hearing dates and lack of appreciation of the problem by various trial judges, which went so far as an order for a deposition before a commissioner known to be out of the country on the date scheduled, with the attorneys "to otherwise agree on a date", when they never had agreed to anything to date of the order,–is set forth in the record.

The trial judge set a trial date in January, 1973 for the first and only time, for July 10, 1973. Experts' names had to be exchanged by May 11, 1973. On April 20, 1973, in an opinion issue in advance sheets in May, 1973, the state appellate court, in another case, abrogated the "locality rule" with respect to medical experts, permitting the petitioners to defeat the "conspiracy of silence" they had encountered in their search for expert witnesses. They asked the trial court to extend the time for exchange of expert witnesses' names and delay of the trial date. The trial court replied with order–"... plaintiffs shall not call any expert witnesses in the trial ..." Plaintiffs' request that the trial be continued to a later date by reason of the failure of defendants' attorneys to agree on dates for holding depositions and adverse examinations, etc. was ignored.

On July 10, 1973, after plaintiffs' lawyer had expended services in preparation of the case reasonably

worth $25,000, consisting of 10-15% of all his time for all his clients over 3½ years (and the maximum he could expend thereon), the case was called to trial, and dismissed on the merits for lack of prosecution. Judgment was entered on the same day versus all the petitioners.

At a conciliation hearing in 1972, the defendants offered $50,000 in settlement. By June, 1973, they had upped their written offer to $90,000, all to knowledge of the trial and appellate courts.

The Federal questions were specifically raised as follows:

As to Questions 1 and 2; Denial of due process and equal protection in that the case be tried without expert witnesses and without the benefit of change in law, and as to being forced to trial unprepared and unable to prepare, respectively; by written arguments in the Supreme Court of Wisconsin briefs filed.

> "Question Involved IV–Did the trial court deny the plaintiffs due process of law and equal protection of the laws";

and in written argument p. 20 thereof–

> "the net effect of the Trial Court's order of June 25, 1973 was to deny the plaintiffs due process of law and equal protection of the law in that it deprived them of the opportunity to benefit from the decisions of the two cases cited ... which specifically provided that they would be applicable to subsequently tried cases."

Also to same effect on p. 23 of said briefs. In the Appellants' Appendix in said briefs before the Supreme Court of Wisconsin, there is set forth those presentations of the due process and equal protection arguments

presented in the trial court, (reference to page of State Supreme Court brief and page of lower court record.)

> "That by reason of the numerous delays, all requested or ordered at the instance of the defendants, the plaintiffs have been unable to prepare their case for a trial as of July 14, 1973 date; . . . to adequately and sufficiently prepare their case as they are entitled to do under a due process of law provision of the United States Constitution; etc." App. 114, R. 159
>
> ". . . that in sum total the plaintiffs would be denied due process of law and the right to adequately prepare their case under the law as it will exist at the time of the trial herein by reason of defendants' refusal and total inability to cooperate with the plaintiffs and permit the plaintiffs to prepare their case for trial; the alteration of the law by the State Supreme Court and plaintiff WALTER CUKROWSKI'S inability to purchase certain documents which are needed by his attorney in order to secure adequate expert witnesses to support his cause and that of his wife." App. 124, R. 182
>
> ". . . that the lower court's refusal to adjourn this matter for trial so as to permit the plaintiffs to furnish names of medical witnesses now available would deny your affiants and the plaintiffs herein equal protection of the law and due process of law, and that they could not take advantage of the decision of the Wisconsin Supreme Court in *Shier v. Freedman*, supra." App. 137, R. 252
>
> ". . . that the lower court's refusal to continue the case for trial and vacate and re-set the dates for the furnishing of medical witnesses herein would deny the plaintiffs due process of law and equal protection of law in that they would be precluded from being able to meet the evidentiary require-

> ments and present evidence in this case which other plaintiffs would be permitted to present in other similar cases after the date of the case of *Trogun v. Fruchtman*, supra." App. 138, R. 253
>
> "That the orders denying continuance, amendment to the time set for the furnishing of medical experts and medical treatises, and the orders quashing subpoenas for the holding of depositions and adverse examinations to various indefinite dates, the same said orders not unequivocally denying said rights to preliminary relief, deny your plaintiffs due process and equal protection of the law, and right to a trial." App. 140, R. 255

On March 19, 1973 before the Trial Judge in renewal of a motion for adjournment of trial and/or striking of notice of trial:

> "We are denied due process of law and equal protection of the law by a ruling of the Court not to adjourn the trial date. . . . I argue that the plaintiff would be denied due process and equal protection of the law and the right to be represented by counsel, the right to have an attorney of their choice, as stated in the Wisconsin Constitution, and the right to have any attorney at all prepare their case." App. 153, R. 306-7
>
> "Plaintiffs would be denied due process and equal protection of the law with respect to trial of this case on the community rule, since the Shier case, decided May 16, 1973, permits us to go out of the area to secure medical experts who would not up to the time of that opinion have been recognized in the trial of this case."
> App. 156, R. 317

As to Question 3; the refusal of the Appellate Court to review on timely appeal a lower court judgment, the matter of course was not raised in the lower court or

the Appellate Court until a motion for rehearing, and in the briefs thereon, page 3:

> "Although Kathleen's cause of action was in no way a part of the Judgment for Dismissal for lack of prosecution, the Order Sustaining the Demurrers to her cause of action, was reviewable upon an appeal from the Judgment. (cases cited). Moreover, Kathleen is certainly a 'party aggrieved' by the Order Sustaining the Demurrers, (case cited), and must be entitled to have the merits of her cause of action considered independently by the Court at the present time."

As to Question 4; to-wit, that the denial before trial of a trial when a litigant chooses to reject what the court might consider to be a reasonable offer; petitioners raised this question on a brief of supplemental authorities; before the Wisconsin Supreme Court:

> "With due respect to the Trial Court's forewarning, plaintiffs argue that the power of a Trial Judge under *Powers v. Allstate Ins. Co.*, 10 Wis. (2d) 78, 102 N.W. (2d) 393 does not extend to what amounts to a denial before trial of a trial, to a litigant who chooses to reject what the court might consider to be a reasonable offer."

With respect to Question 5, to-wit; failure to present in the opinion facts of unquestioned importance, the petitioners argue that this matter would not have to be raised in the trial court by virtue of its unique nature. The failure of the Appellate Court to consider on a question of miscarriage of justice, the well argued facts that the defendants did offer the plaintiffs $90,000.00 to settle the case just a few days before dismissal on the merits would indicate that the Appellate Court's

omission to refer to the same must have been intentional or a case of gross neglect, and in either instance in poor taste to again call to their attention. However, where the U.S. Supreme Court has the case before it, this peculiar set of facts should be considered as an instance of where the lower Appellate Court has perhaps "so far departed from the accepted and usual course of judicial proceedings,—as to call for an exercise of this court's power of supervision." Rules of Federal Supreme Court, Rule 19, 1 (b), for reasons argued herein, infra.

ARGUMENT

REASONS FOR GRANTING WRIT

Question 1

This case presents the plight of the 150,000,000 middle class Americans who may have a large case,—too wealthy to receive a free lawyer through Legal Aid, yet too poor to hire a lawyer on an hourly basis. This plight was recently aired nationally on the Public Broadcasting System, 475 L'Enfant Plaza S.W., Washington, D. C. 20024, Tel. 202-488-5073, in cooperation with the National Public Affairs Center for Television (IMPACT), 2025 "M" Street N.W., Washington, D. C., Tel. 202-484-1500; in a presentation entitled, "A Matter of Justice—Lawyers and The Public Interest." Although they can ultimately get their case to trial, the recent tendency is for the trial court to run roughshod over their constitutional rights, if that will "clear the calendar" of what may become a trial of any length.

The tendency to want to clear the calendar at any cost, even in the absence of any contention of prejudice to either side appears to have emanated from the highest sources, without due consideration of the vast number of Americans unable to finance extensive litigation other than by the contingent fee. Yet such contingent fee cases by nature (the lack of current remuneration) are preparable by lawyers for most Americans (due to economics of law practice) only by spreading the case's work over a period of time while earning a living from his other cases.

This serious problem will continue until the day prepaid legal plans are available to pay the lawyers in the manner your petitioner's group medical insurance paid his $75,000 in medical bills. Until such day, the principles of *Padovani v. Bruchausen,* infra, should prevail, for otherwise middle class Americans will be deprived of due process and equal protection of the law whenever prosecuting extensive litigation.

The U.S. Supreme Court should issue a Writ, so it may elucidate on the plight of the middle class American and his inability to pay for counsel in the large case, vis a vis the desire of trial judges to rid their file cabinets of case files. Whose rights are paramount, the citizen's or the judicial civil servant's, where no showing of prejudice to litigants on either side of a case is shown or alleged?

Question 2

A lower court ordered, the plaintiffs to trial, and that they "shall not call any expert witnesses", and

denied them the benefit of a recent change in Wisconsin law in the process.

The right to present evidence necessary to prevail is an absolutely basic right to a litigant. The record before the Supreme Court of Wisconsin–affidavit of Dr. E. Clinton Texter, (Appendix D) stated plaintiffs had to use an expert witness on several points to prevail. Defendants could hardly challenge his expertise–Texter was the expert hired by defendant Hospital to lecture to the other defendants, in order to bring the defendants up to standard after injuring your petitioner and others during the same medical procedure. Respected authority, in an identical situation, *Padovani v. Bruchausen,* U.S.C.A. 2d (1961) 293 F.2d 546, holds that a preclusion order removing all basis for proof by plaintiff of his claim was improper in view of the order, drastic nature of the penalty inflicted and because the order not only was unauthorized but was at odds with the purpose and intent of the federal rules.

Although the same Supreme Court of Wisconsin ordered in *Shier v. Freedman*, 206 N.W.2d 166, 58 W. 2d 269, on April 20, 1973, that a litigant in all future trials could utilize, out state expert witnesses; the trial court knowingly on June 25, 1973 refused to permit the plaintiffs to benefit from such decision, ordering, "plaintiffs shall not call any expert witnesses in the trial of the above-entitled action." Plaintiffs were in no financial position to spend thousands of dollars bringing in distant experts in the hope that the trial judge might change his mind, when he had said June 25, 1973:

> COUNSEL. "Plaintiffs would be denied due process and equal protection of the law with respect to trial of this case on the community rule,

since the Shier case, decided May 16, 1973, permits us to go out of the area to secure medical experts who would not up to the time of that opinion have been recognized in the trial of this case. Therefore, the pre-trial order would have to be vacated and re-entered to permit us to present these witnesses as permitted in the Shier case."

THE COURT. "I know of no basis by which you can ground that statement on fact. Motion to confirm the pre-trial order and suppress the introduction of expert testimony by the plaintiffs insofar as it is prohibited by failure of the plaintiffs to notify the defendants of the names of those experts is granted."

App. 156, R. 317

The Supreme Court of Wisconsin, in spite of the unequivocal statement and wording of the order of preclusion found that the order didn't deny due process or equal protection or prevent the plaintiffs from seeking witnesses outside the Milwaukee locality! Perhaps true; but if witnesses were found it was certainly clear, the trial judge would never let such witnesses testify, denying a basic right of a fair trial, presentation of evidence without which they could not prevail.

The right to present the minimum evidence required to prevail on trial is basic. The right to present such evidence here, as held admissible by the same Wisconsin Supreme Court, just weeks prior to the preclusion order of the trial court has been denied your petitioners without even a distinguishing word by the lower appellate court.

A Writ should issue to enable this court to raise the principles set forth in the decision of *Padovani v.*

Bruchausen, supra, to the height of respect they should enjoy, in view of the manner they were ignored by the Supreme Court of Wisconsin. Further, what court in this land should have the power to say that litigants may henceforth offer certain evidence to support their cause *except* "you in your case"?

Question 3

The state appellate court refused to consider the merits of daughter-petitioner's claim of loss consortium–(solatium). She previous was demurred out of the case on this cause, *AND COULD NOT LEGALLY PARTICIPATE THEREAFTER,* and of course was not mentioned as a participant in the order dismissing your other petitioners' causes for "lack of prosecution". (Appendix B) She timely appealed from the judgment against all your petitioners, Wisc. Stat. 274.01, *Sawejka v. Morgan,* 1972, 56 W. 2d 70, 74, 201 N.W. 2d 528.

After appeal of September 28, 1973 and briefs in the case at hand had been filed in March, 1974, raising the issue presented in the February, 1970 complaint, the appellate court, on a case commenced June 13, 1972, with order sustaining demurrer entered May 30, 1973, and appealed July 24, 1973, argued October, 1974, and decided February, 1975, "sunburst" the existence of additional interfamily loss of society cause of actions, other than the husband-wife cause theretofore recognized; also it affirmed that it was a separate, distinct cause of action which for procedural reasons only should be prosecuted with the other causes if existing. *Shockley v. Prier,* 66 W. 2d 394, ____ N.W. 2d ____.

The Federal Supreme Court, in *Lindsey v. Normet*, 92 S. Ct. 862–405 U.S. 56, 31 L. Ed. 2d 36, has held:

> "Where a state provides appellate review, it cannot be granted to some litigants and capriciously and arbitrarily denied to others without violating the Equal Protection Clause."

The state appellate court has clearly swept this error under the rug by not even writing an opinion on the motion for rehearing when the error in its decision was called to its attention. It apparently would prefer not to benefit your petitioner (daughter) with the benefit of *Shockley*, supra, or, as J. Douglas commented again in *Daniel v. Louisiana*, Docket 74-5369–Jan. 27, 1975, 43 LW 3415, J. Douglas, dissenting:

> "Here, as in the case of Miranda, it is largely chance that we take one of several or many cases presenting the same issue. It is I think, highly unfair to make the opinion in the case we take retroactive in that petitioner's case but not retroactive in others of the same vintage and pending here. If we sought equal justice for all we would either make all of our constitutional decisions retroactive or all of them prospective only."

We also have a constitutional issue, not merely substantive rights and the recognition of the existence of a litigant's cause of action. This litigant pleaded her cause as well as appealed, long before *Shockley*, supra, was ever decided or announced, February, 1975. The decision in your petitioners' case on March 28, 1975, only a month later, *without mention* of the previous *Shockley*, supra, decision, which affirmed the existence of your petitioner's cause, was highly unfair, unprecedented in Wisconsin law and a denial of equal

protection of the law to the daughter-petitioner's cause.

A Writ should issue to stop such arbitrary, capricious activity by a state appellate court. The Due Process and Equal Protection Clauses (of the Fourteenth Amendment) protect persons like the daughter-petitioner from invidious discriminations. Such discriminations are violative of the entire spirit of fairness and equality upon which our judicial institutions are founded.

Question 4

At the first meeting with the trial judge, in 1972, the defendants offered $50,000 in settlement. By June, 1973, they had upped the offer to $90,000. In the interim, the series of orders mentioned in the lower appellate court opinion (and some misquoted) were entered, all handcuffing the plaintiffs' preparation. For instance, a motion to have records examined by necessity at their document examiner's office on his office equipment, was "granted", where examination was ordered *in chambers*.

With due respect to the Trial Court's forewarning, plaintiffs argue that the power of a Trial Judge under *Powers v. Allstate Ins. Co.*, 10 Wis. (2d) 78, 102 N.W. (2d) 393 does not extend to what amounts to a denial before trial of a trial, to a litigant who chooses to reject what the court might consider to be a reasonable offer. In determining whether the Trial Court abused its discretion and in effect was extending *Powers v. Allstate*, supra, in the series of orders entered, culminating in a dismissal with a bootstrap bench pronouncement, the court should recall the maxim,

"Animus ad se omne jus ducit" (It is to the intention that all law applies.) and not "Ambiguis casibus semper proesumitur pro rege" (In doubtful cases the presumption is always in favor of the king.)

The Supreme Court should issue a Writ, to review this record and announce that it will not permit any trial judge by means of an endless series of orders to hamstring the preparation of a case in order to force a litigant to accept a settlement offer *before* trial under threat of dismissal, contrary to the spirit of *Arkansas Valley Land & Cattle Co. v. Mann* (1889) 130 U.S. 69, 9 Sup. Ct. 458, 32 L. Ed. 854, and violative of due process of law, equal protection of the law and the U.S. Constitution, Amend. VII, (jury trials).

Question 5

Important facts underlying a claim of miscarriage of justice were argued before the lower appellate court, such as a $90,000 written settlement offer, days before a dismissal on the merits for lack of prosecution, and are not mentioned in the appellate decision.

Petitioners argue that a Writ should issue to review such peculiar set of facts, as such should not be the accepted usual form for an appellate court decision.

For over fifty years from 1923 to about the time of the lower court decision the American Bar Association Code of Judicial Ethics provided:

> "Canons of Judicial Ethics 19. Judicial Opinions. In disposing of controverted cases, a judge should indicate the reasons for his action in an opinion showing that he has not disregarded or overlooked serious arguments of counsel. He thus shows his full understanding of the case, avoids the suspicion of arbitrary conclusion, promotes confidence in his intellectual integrity and may contribute useful precedent to the growth of the law."

Is restatement by the American Bar Association of the Code of Judicial Ethics omitting the above an indication that the above principal is no longer appropriate? A Writ should issue under this court's superintending authority to dispel any such suggestion.

CONCLUSION

All the following present an indication of violation of due process, equal protection and right to a jury trial as spelled out in decisions of this court, on matters of great substance to the forgotten middle class American.

1.) "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has". *Griffin v. Illinois*, 351 U.S. 12 (1956) at 19, 96 S. Ct. 585, 100 L. E. 891. Is this principle not equally applicable to a civil litigant, even though not yet in the poor house or on welfare but living just above that standard?

2.) How far can a trial judge go to restrict a litigant's presentation and have his appellate court approve? Can it go so far as to prevent him from prevailing?

3.) Has *Lindsey v. Normet*, supra, been renounced, approving arbitrary grant of review to just a favored few, in the discretion of the lower appellate court?

4.) Can devious means under guise of judicial discretion deprive a litigant of a jury trial?

5.) How far can a lower appellate court go to conceal the facts from those who would peruse the

reported cases? Are such readers not the real protectors of our fundamental rights, when stirred into action by what they read?

Respectfully submitted,

/s/Donald H. Mueller
DONALD H. MUELLER
Attorney for Petitioners

APPENDIX A

No. 389

STATE OF WISCONSIN IN SUPREME COURT

WALTER J. CUKROWSKI, et al.,

Appellants,

v.

MT. SINAI HOSPITAL, INC., et al.,

Respondents.

FILED
MAR 28 1975
[illegible]
CLERK OF SUPREME COURT
MADISON, WISCONSIN

APPEAL from a judgment and prior orders of the circuit court for Milwaukee county: JOHN A. DECKER, Circuit Judge. *Affirmed.*

This is a medical malpractice action brought by the plaintiffs-appellants Walter J. Cukrowski, his wife, Helen G. Cukrowski, and their daughter, Kathleen Cukrowski, against the defendants-respondents, Mt. Sinai Hospital, Inc., and six doctors, residents and interns who allegedly took part in performing medical services for Walter J. Cukrowski. Named as defendants are, Dr. Richard L. Franklin, Dr. Irvin M. Becker, Dr. Walter Hogan, Dr. Phillip S. Guzelian, Dr. Herbert A. Oxman and Dr. Henry M. Goldberg.

On September 18, 1972, a demurrer was sustained as to the complaint of Kathleen Cukrowski which sought recovery for the loss of society, support and services of her father. On July 10, 1973, the defendants' motion

to dismiss the action for the unreasonable neglect of the plaintiffs to prosecute was granted and judgment entered on that date dismissing the complaint. The plaintiffs appeal fron. the judgment and various prior orders of the trial court, including the order sustaining the demurrer.

CONNOR T. HANSEN, J.

On February 15 and 16, 1967, Walter Cukrowski allegedly entered Mt. Sinai Hospital to have his esophagus dilated with a mosher bag. The complaint alleges that during the course of this surgical procedure, Cukrowski's esophagus was perforated which perforation went undetected for sixteen hours because of the inadequate postsurgical facilities and care. The exact extent of Cukrowski's disability from the effects of this alleged negligence is not disclosed in the record. It is alleged, however, that he incurred $75,000 in medical expenses in order to save his life and that he has some type of permanent disability.

We consider the dispositive issues on this appeal to be:

1. Did the trial court abuse its discretion in entering orders challenged by the plaintiffs?
2. Did the trial court abuse its discretion in dismissing the complaint?
3. Were the plaintiffs denied due process and equal protection of the laws?

The instant action was commenced on February 14, 1970, approximately three years after the alleged negligence, and one day before the statute of limitations would have run. Lawyer Mueller was retained by the plaintiffs, on a contingent fee basis, in August, 1969, six months before the complaint was

given to the sheriff for service. Allegedly due to the assurances of counsel for the plaintiffs that he would probably serve an amended complaint making it unnecessary to immediately answer the original complaint, the defendants' answers were served on the following dates: Becker and Goldberg, April 1, 1970; Hogan, March 3, 1971; Franklin, March 5, 1971; Guzelian, September 13, 1972; and Hospital and Oxman, January 11, 1973.

Between the service of the summons and complaint in February, 1970, and September 11, 1972, no action was taken *of record* by counsel for the plaintiffs with two exceptions. On February 10, 1971, a deposition was taken of Cukrowski to perpetuate his testimony at the plaintiffs' initiative. On April 1, 1970, and again in March, 1971, the plaintiffs attempted, unsuccessfully to subpoena Oxman, then a resident of Minnesota, for an adverse examination.

On August 4, 1972, a motion was made by Becker and Goldberg to sustain their demurrers to the complaint of Kathleen Cukrowski. Counsel for the plaintiffs opposed the motion, a hearing was held, and an order entered by the trial court sustaining the demurrer on September 18, 1972.

On September 27, 1972, Becker and Goldberg served and filed a certificate of readiness and notice of trial. At this time, neither the Hospital nor Oxman had answered the complaint. On October 19, 1972, plaintiffs' counsel moved for an order striking the notice of readiness for trial, alleging in his affidavit that he had an agreement with several of the defendants' lawyers that there might be an amended complaint and that they need not answer. Counsel also asserted that he needed more time to collect evidence and take

depositions of potential witnesses. A hearing was held on October 30, 1972, and the motion to strike the notice was denied by written order of the trial court dated November 3, 1972.

A pretrial conference, in which all parties participated, was held on January 5, 1973. Pursuant to that conference a pretrial order, dated January 16, 1973, set the trial for July 10, 1973, and required that the plaintiffs notify the defendants of the names of experts they intended to call at the trial and treatises they intended to use by May 11, 1973. The defendants were required to reciprocate with names and titles by June 10, 1973.

On February 14, 1973, plaintiffs noticed a deposition to be taken of Elizabeth Thompson, a registered nurse at the hospital, to be taken on March 6, 1973, and issued a subpoena for her to appear. Pursuant to a show cause order initiated by Franklin and Hogan, a hearing was held on February 26, 1973, before Leander J. FOLEY, Jr., Circuit Judge, at which time defendants requested that the deposition be postponed because of a scheduling conflict of the lawyers. Plaintiffs' counsel opposed the postponement on the ground that he had no time available in April to conduct the deposition and that if postponed, he would have insufficient time to take other necessary depositions. Counsel also asserted that he was unable to get the lawyers for the various defendants to cooperate on picking a mutually convenient time to hold the necessary depositions. By order dated March 1, 1973, Judge FOLEY adjourned the deposition to April 6, 1973 or such other time as counsel for the parties could agree upon.

On March 2, 1973, plaintiffs noticed an adverse deposition of Michael Elliot, the hospital administrator,

to be held on March 20, 1973. By an order to show cause, the lawyers for Franklin and Hogan moved for an adjournment of this deposition. The reason given was that the lawyers were going to be trying a case on the date in question. A hearing was held on March 19, 1973, at which time plaintiffs' counsel again informed the court that if the depositions were all delayed until April, that he would not be able to fully prepare for trial or meet the May 11, 1973, deadline for notifying the defendants of the experts he intended to call. The trial court informed counsel for the plaintiffs that it would treat any notice of deposition of an expert as notice that the expert would be called at trial. By order dated April 13, 1973, the trial court adjourned the deposition to April 23, 1973.

Additionally, on March 2, 1973, the plaintiffs' counsel noticed an adverse deposition to be taken of Dr. Norbert Enzer on March 15, 1973. Allegedly, Dr. Enzer, the chief pathologist at the hospital, had made a detailed report on the incident concluding that the hospital had no defense to the action. However, Dr. Enzer was in Europe for six weeks and was not deposed.

Counsel for the plaintiffs failed to submit the names of any experts it intended to call at trial or notice the deposition of any experts by the May 11, 1973, deadline, as set by the pretrial order. On June 19, 1973, Becker and Goldberg moved to prohibit the plaintiffs from calling any experts. Plaintiffs' counsel made a counter motion on the morning of the hearing to have the pretrial order vacated and to obtain a continuance of the trial date. He also requested that the defendants be required to produce the original hospital

records pertaining to Cukrowski. At the hearing on June 25, 1973, the trial court denied the plaintiffs' motions with regard to the pretrial order and continuance. Plaintiffs' motion as to the hospital records was granted; the records were to be deposited with the court and available to the plaintiffs' expert document examiner, and a copy of the records was also ordered to be deposited with the court. The trial court also granted the defendants' motion concerning the expert witnesses. An order reflecting these decisions was entered on the day of the hearing, June 25, 1973.

On July 6, 1973, the plaintiffs filed an application for a writ of prohibition with this court seeking a stay in the commencement of the trial. The application was denied.

On July 10, 1973, the case was called for trial. Counsel for the plaintiffs renewed this motion to have the trial continued, which was denied. Counsel announced that he was not prepared to try the case, and upon motion by the defendants the complaint was dismissed for lack of prosecution. Judgment was entered the same day.

The plaintiffs, by an order to show cause dated September 11, 1973, moved the trial court to reopen the judgment. A hearing was set by the trial court for October 29, 1973, after the time when a notice of appeal from the judgment would have been required. This appeal was taken from the judgment and a motion was made by the plaintiffs to have the case remanded to the trial court for the hearing on the motion to reopen. This court denied the motion to remand.

ABUSE OF DISCRETION–PRETRIAL ORDERS.

The plaintiffs contend that the trial court abused its discretion in entering orders denying a number of their pretrial motions.

The plaintiffs raise this issue as it relates to the following orders:

1. Order dated November 3, 1972, denying a motion to strike the notice of trial and certificate of readiness filed by Becker and Goldberg on September 27, 1972.[1]

2. Pretrial order of January 16, 1973, which, among other things, set the case for trial on July 10, 1973.

3. The order adjourning the deposition of nurse, Elizabeth Thompson, from March 6, 1973, to April 6, 1973.[2]

4. The order adjourning the deposition of witness, Michael Elliot, the hospital administrator, from March 20, 1973, to April 23, 1973.

5. The order of June 25, 1973, granting defendants' motion to prohibit plaintiffs from calling expert witnesses at trial for failure to comply with the pretrial order of January 16, 1973, requiring exchange of names of witnesses by May 11, 1973.[3] The order also denied cross-motions of the plaintiffs to strike the notice of

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[1]Sec. 270.115, Stats., provides that a certificate of readiness may be filed 40 days after joinder of issues. In this case it was filed more than two years after Becker and Goldbert served their answers.

[2]No deposition was ever taken of witness Thompson.

[3]During prior proceedings, the trial court had advised plaintiffs they could include persons noticed for deposition in their list of witnesses and treatises required by the pretrial order. No list was ever exchanged or filed.

trial and pretrial order and grant a continuance of the trial date.

We commence our consideration of this issue by again stating that the alleged injuries occurred February 15 and 16, 1967. Plaintiffs retained counsel in August, 1969. The complaint was delivered to the sheriff for service on February 14, 1970, one day before the expiration of the statute of limitations. The record reflects that in 1971, a deposition was taken of plaintiff, Cukrowski, to preserve his testimony. Also an attempt was made to depose defendant Oxman, a resident doctor at the time of the incident, who was no longer a resident of the state.

Except for the two instances noted above, the record is barren of any attempt on the part of the plaintiffs at discovery until after the pretrial order of January, 1973, which set the trial date as July 10, 1973. The only discovery attempted during this six-month period commenced in February, 1973, and was directed to nurse Thompson, hospital administrator Elliot, and Dr. Norbert Enzer, pathologist.

In *Latham v. Casey & King Corp.* (1964), 23 Wis.2d 311, 314, 127 N.W.2d 225, this court stated:

> "... The general control of the judicial business before it is essential to the court if it is to function. 'Every court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket with economy of time and effort.' 14 Am. Jur., Courts, p. 371, sec. 171, Inherent Powers of Courts, 1963 Suppl., p. 77...."

The principal thrust of the plaintiffs' argument on this abuse of discretion issue is that they did not have

sufficient time to prepare their case and that the number of defendants created the difficulties they allegedly encountered in preparing. We find nothing in the record to support either of these contentions.

Our examination of the record leads us to but one conclusion. It is that an experienced trial judge commenced in October, 1972, to bring a case on for trial which arose out of an incident alleged to have occurred in February, 1967. It was at the October, 1972, hearing on plaintiffs' motion to strike the certificate of readiness and notice of trial of defendants Becker and Goldberg that the trial judge advised plaintiffs that the case would be set for trial in June or July of 1973. Each of the orders challenged by the plaintiffs was the result of notice and after a full hearing before the courts. the orders were promptly entered and explicit as to detail. It is our further opinion that the record further demonstrates that in a number of instances the trial court considerably extended itself to accommodate the plaintifffs. An example relates to the plaintiffs' demand for the hospital records. A copy was made available to the plaintiffs at the examination of the hospital administrator, Elliot, in April, 1972, for approximately $200. The record indicates actual cost thereof was considerably more. It was not until the June 25, 1973, hearing that plaintiffs demanded production of the original records for inspection by their expert document examiner. The trial court ordered that the original records and a copy be immediately placed on file with the court and made available to the plaintiffs.

We can find no abuse of discretion arising out of the entry of any of the orders of the trial court. It is our opinion that the trial court exercised wise and discerning judicial discretion in each instance.

DISMISSAL OF COMPLAINT

The plaintiffs argue that the trial court abused its discretion in dismissing the complaint of the plaintiffs because of unreasonable neglect on the part of the plaintiffs to proceed in the cause.

This court has held that a trial court may dismiss an action for failure to prosecute under ss. 269.25 or 270.54, Stats., or under its inherent power to insure that an action pending before it is diligently prosecuted. *Zeis v. Fruehauf Corp.* (1972), 56 Wis.2d 486, 202 N.W.2d 225; *Lawrence v. MacIntyre* (1970), 48 Wis.2d 550, 180 N.W.2d 538; *Taylor v. State Highway Comm.* (1970), 45 Wis.2d 490, 173 N.W.2d 707; *Latham v. Casey & King Corp., supra.* Under any of the three, the question of dismissal is addressed to the sound discretion of the trial court which will not be upset on appeal unless a clear abuse of discretion is shown by a clear and justifiable excuse for the delay. *Zeis v. Fruehauf Corp., supra; Gawin v. Redevelopment Authority of Milwaukee* (1971), 52 Wis.2d 380, 190 N.W.2d 201; *Taylor v. State Highway Comm., supra.* This court, in *Lawrence v. MacIntyre, supra,* page 556, clearly stated its view of the matter:

> "Courts are glutted with stale lawsuits, and the responsibility of an attorney to his client, as well as to the judicial system, requires that counsel be ready for trial in a reasonable time. One of the principal causes for delay in the trial courts is the failure of counsel to be in readiness when his case is called for trial or his lack of vigor in moving his case to the trial stage. . . .
>
> ". . . The responsibility of advancing a case on the calendar and preparing it for trial is upon the plaintiff's lawyer. It is not the responsibility of the judge. The judge's responsibility is to properly try cases that are ready for trial. He has the corollary and related responsibility of dismissing stale cases which clog judicial calendars."

In *Latham v. Casey & King Corp., supra,* pages 314, 315, this court stated:

> ". . . . Perhaps the greatest area of the exercise of the power is the failure to diligently prosecute a case. In *Smith v. Carter* (1910), 141 Wis. 181, 184, 122 N.W. 1035, this court considered the dismissal of a complaint for lack of prosecution to be in the field of the court's broad discretion over the control of cases and stated, 'it is the duty of the trial courts, independently of statute and under inherent powers, to discourage it [protraction of litigation] as much as possible and to refuse their aid to those who negligently or abusively fail to prosecute the actions which they commence.' "

From the commencement of the action to the date when the defendants demurred to the cause of action by Kathleen, a period of two years, seven months, there was no record action taken by the plaintiffs except a deposition to preserve the testimony of Cukrowski and an attempted deposition of Oxman. No discovery was noticed, attempted, requested, or conducted of the principal physician-defendants, Becker, Hogan and Franklin, at any time either before serving the complaint or in the three-and-one-half years between commencement of the action and the date of trial. Of the three depositions noticed by the plaintiffs between February, 1973, and April, 1973, which followed the defendants' attempts to bring the case to trial by filing a notice of readiness for trial, and having a pretrial conference held and trial date set, the record reflects

that only one of the depositions was actually held, that of the hospital administrator, Michael Elliot. On May 11, 1973, the date by which the plaintiffs were to notify the defendants of their intended expert witnesses and treatises, which under the trial court's order could be accomplished merely by giving notice of deposition up to and including the month of May, the plaintiffs gave no such notice. Having been denied a writ of prohibition by this court in early July, 1973, which sought to have the trial date postponed, the plaintiffs appeared on the date of trial, July 10, 1973, by their counsel and asserted that they were not prepared to proceed.

On appeal, plaintiffs endeavor to demonstrate to this court that there was justifiable excuse for their inability to prepare for trial. Their showing is by way of affidavit and not by way of evidence placed in the record. Defendants contend that, as such, the assertions of the plaintiffs are clearly self-serving and should not be regarded as fact by this court.

The plaintiffs assert that the case was brought to the present counsel six months before the statute of limitations was to run having unsuccessfully attempted to retain numerous other lawyers; that present counsel took the case on a contingent fee basis; that numerous potential witnesses were contacted who refused to become involved in the case; that prior to August, 1972, many hours were spent doing preliminary research on the issues, contacting potential witnesses, discussing problems with the defendants' lawyers, consulting with another law firm which was handling a similar case, and consulting with the plaintiffs; that after August, 1972, counsel for the plaintiffs spent

numerous hours drafting affidavits and legal papers in response to the motions of the defendants, attending court appearances, and attending depositions of the defendants in the similar case being handled by the other law firm; that after January, 1973, preparation for the case was virtually a daily affair; that overall plaintiffs' counsel spent 465 hours of recorded time on the case and estimates that that represented nearly 600 hours of actual time; that the time spent represented nearly one-tenth to one-eighth of all his hours of service to all of his clients; and that since the case was on a contingent fee basis, it would have been impossible for plaintiffs' counsel to have spent any more time preparing the case and still maintain his practice. The plaintiffs also repeat their assertion that in the last six months, between the pretrial order and the date of trial, the delay in preparation was primarily the fault of the defendants.

The record does not reflect that the trial court was ever informed of the exact amount of time spent in preparation of the case until those allegations were presented in an affidavit supporting the motion to reopen judgment in September, 1973. However, the trial court was generally informed of the circumstances as he read the affidavit presented to this court on the application for the writ of prohibition before he dismissed the action on July 10, 1973.

In *Wagner v. Springaire Corp.* (1971), 50 Wis.2d 212, 217, 218, 184 N.W.2d 88, this court defined "excusable neglect" as the neglect which might have been the act of a reasonably prudent person under the same circumstances, and held that the pressure of other work is not excusable neglect without additional persuasive

explanation. In *Taylor v. State Highway Comm., supra,* page 495, this court rejected the claim that difficulties in retaining trial counsel or in getting counsel that was hired to act, excused the party from a failure to prosecute where the record showed a lack of diligence on their part in urging the prosecution of the case.

This court has held that a trial court has the power to compel a plaintiff to proceed with trial or take a dismissal on the merits. *Russell v. Johnson* (1961), 14 Wis.2d 406, 111 N.W.2d 193; *Estate of Hatten* (1940), 233 Wis. 256, 289 N.W. 630. The obligation to bring his case to trial within a reasonable time lies with the plaintiff. *Taylor v. State Highway Comm., supra.* It is the legislative, judicial and public policy of long standing that actions should not be permitted to slumber indefinitely and it is within the inherent power of a court to fashion sanctions and penalties best calculated to aid the court in its control of the judicial business before it. *Lawrence v. MacIntyre, supra; Taylor v. State Highway Comm., supra.*

The trial court did not abuse its discretion in entering judgment dismissing the complaint of the plaintiffs in the present case for unreasonable neglect on the part of the plaintiffs in its prosecution.

DUE PROCESS AND EQUAL PROTECTION.

The plaintiffs assert that the failure of the trial court to vacate the pretrial order and continue the date of trial denied them equal protection of the laws and due process of law for two reasons: (1) They were prohibited from taking advantage of the recent

decisions of this court in *Shier v. Freedman* (1973), 58 Wis.2d 269, 206 N.W.2d 166, 208 N.W.2d 328; and *Trogun v. Fruchtman* (1973), 58 Wis.2d 569, 207 N.W.2d 297; and (2) they were not given sufficient time to raise the money to purchase the copies of Cukrowski's medical records.

The *Shier Case* was decided by this court on April 20, 1973, approximately three weeks prior to the date by which the plaintiffs were required to notify the defendants of the experts they intended to call at trial. In that case, this court abolished the "locality rule" thereby first permitting the use of medical experts outside the local community.

At the hearing on June 25, 1973, counsel for the plaintiffs argued to the trial court that the *Shier Case* now enabled him to obtain medical experts to testify whereas his attempts to obtain a medical expert in the Milwaukee area had been unsuccessful. At no time did counsel indicate that he had any specific witnesses in mind or that he was in contact with any such witnesses. The trial court responded, in effect, that without more specific information as to who the plaintiffs intended to call, and when the plaintiffs would be ready for trial, he would not extend the trial date or relieve the plaintiffs of the obligation to notify the defendants of the experts' names as provided in the pretrial order.

The action of the trial court did not prevent the plaintiffs from seeking witnesses outside the Milwaukee locality. The inability, if it existed, was not created by the ruling of the trial court, and, under the circumstances the plaintiffs were not denied due process or equal protection.

The *Trogun Case, supra,* was decided on May 21, 1973. That case involved the issue of informed consent. If anything, that case made the plaintiffs' task in this case easier. The plaintiffs assert, however, that since the defendants did not notice any expert which they intended to call, the *defendants* were denied the opportunity to defend against the plaintiffs' cause of action for informed consent by the pretrial order of the trial court. The plaintiffs do not have standing to complain that the defendants were thereby denied due process and equal protection.

With regard to the cost of obtaining copies of the 1600 pages of Cukrowski's medical records, the plaintiffs rely on *Mars v. Luff* (Sup. Ct. of App. W. Va., 1972), 186 S.E.2d 768. In that case, relying on *Boddie v. Connecticut* (1971), 401 U.S. 371, 91 Sup. Ct. 780, 28 L.Ed.2d 113, as direct authority, the court held that an indigent couple, who applied for a divorce, were denied due process of law by the rejection of the application because of an inability to pay the court filing fees and costs.

The *Mars Case* and the *Boddie Case* have little to do with the claim that the plaintiffs here assert. The facts of the present case do not rise to the level of the asserted rule of law. The plaintiffs did not contend that they could not afford the $216 cost of the medical copies, but that additional time was necessary to secure the money. This falls short of showing the indigency as presented in the *Mars Case* or the *Boddie Case* and relates to an entirely different factual situation. This cost should have been anticipated by the plaintiffs and appropriate action taken. To say that more time was constitutionally required after the extended lapse of

time since the cause of action occurred is completely unrealistic. The record also reflects that the trial court made the records available to the plaintiffs at no cost immediately upon being requested to do so. On June 25, 1973, when the plaintiffs made demand for the original records it was ordered that the originals and a copy be deposited with the court until the conclusion of the trial and that they be made immediately available to the plaintiffs.

We are of the opinion that the plaintiffs have not been denied due process or the equal protection of the laws.

September 18, 1972, the trial court sustained the demurrer of Becker and Goldberg to the complaint of Kathleen Cukrowski, daughter of the plaintiffs, Walter J. and Helen G. Cukrowski. The daughter was a minor at the time of the injury and an adult at the time the action was commenced. The complaint of Kathleen alleged a cause of action for the loss of society, support and services of her father. On this appeal, the plaintiffs present issues relating to the order of the trial court sustaining the demurrer of Becker and Goldberg. However, since we affirm the judgment of the trial court dismissing the complaint of the plaintiffs as to all the defendants, we do not reach the issues raised in the demurrer proceeding.

The plaintiffs request this court to exercise its discretion pursuant to sec. 251.09, Stats., and reverse the judgment in this case, or in the alternative, remand the case to the trial court so that it can consider the motion to reopen the judgment, to prevent a miscarriage of justice. We have fully considered all of the arguments advanced by the plaintiffs and decline to order a new trial in the interest of justice.

This case was scheduled on the assignment of cases on the March, 1975, calendar of this court which commenced March 3, 1975. Under date of March 4, 1975, the plaintiffs requested permission to file a reply brief. The request is denied.

By the court.—Judgment and orders affirmed.

APPENDIX B

(Seal) Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

ROBERT O. UEHLING
CLERK

Madison, June 3, 1975

TO

Rowan, Slaby, *Mueller* & Ilse
324 E. Wisconsin Ave.
Milwaukee, WI 53202

Schellinger & Doyle, S.C.
Attn: James A. Baxter
111 E. Wisconsin Ave.
Milwaukee, WI 53202

Arnold, Murray & O'Neill, Milwaukee
Binder, Zirbel & Howard, Milwaukee
C. Donald Straub, Milwaukee
Fulton, Menn & Nehs, Appleton

Sir:—The Court today announced decision in your case as follows:

WALTER J. CUKROWSKI et al v. MT. SINAI HOSPITAL, INC., #389.

Motion for rehearing denied with costs.

No opinion filed.

Respectfully yours,
ROBERT O. UEHLING
Clerk of Supreme Court.

STATE OF WISCONSIN,

SUPREME COURT

WALTER J. CUKROWSKI, et al,)
Appellants,)
) Case No. 389
v.)
MT. SINAI HOSPITAL, INC., et al,)
Respondents)

Please take notice, that the costs of the respondent, on the appeal in this action, will be taxed and the amount thereof ascertained and inserted in the judgment, by and before Robert O. Uehling, Esq., Clerk of said Court, at his office in the City of Madison, in said State, on the 16th day of June, 1975, at 9:00 o'clock in the forenoon.
The following is a bill of said costs.

– – –

(omissions)

The above costs and disbursements are hereby adjusted, taxed and allowed this 23rd day of June, 1975, at Eight and 34/100———dollars and———cents ($8.34)

/s/Robert O. Uehling Clerk

APPENDIX C

STATE OF WISCONSIN MILWAUKEE COUNTY
: CIRCUIT COURT :

WALTER J. CUKROWSKI,
HELEN G. CUKROWSKI, and
KATHLEEN CUKROWSKI,
Plaintiffs,

Case No. 386-841

v. *ORDER FOR DISMISSAL*

MT. SINAI HOSPITAL, INC.,
DR. RICHARD L. FRANKLIN,
DR. IRVIN M. BECKER,
DR. WALTER HOGAN,
DR. PHILLIP S. GUZELIAN,
DR. HERBERT A. OXMAN and
DR. HENRY M. GOLDBERG,
Defendants.

The above-entitled action being instituted in February, 1970, by service of a Summons and Complaint alleging medical malpractice and negligence of Mt. Sinai Hospital, Inc., with respect to certain services performed in February, 1967, and issues having been joined March 9, 1970, between the defendants Becker and Goldberg and the plaintiffs, and a notice of trial having been served September 26, 1972, and the plaintiffs having moved on the 30th day of October, 1972, for an order striking the notice of trial, which motion was denied by written order dated November 3, 1972, and the Court having conducted a pre-trial conference January 5, 1973, and having entered a

written order dated January 16, 1973, scheduling the captioned case for trial as the No. 1 case on July 10, 1973, and the attorney for the plaintiffs on the 25th day of June, 1973, having moved the Court for an order vacating the pre-trial order and for an order cancelling the trial scheduled for Tuesday, July 10, 1973, and for an order striking the notice of trial, and for an order requiring the defendant, Mt. Sinai Hospital, Inc., to deliver an original and copy of the entire hospital record of the plaintiff, Walter J. Cukrowski, for all of his hospitalizations at Mt. Sinai Hospital, Inc., for inspection by the plaintiffs' attorney and by the questioned document examiner to be employed by the plaintiffs' attorney, and the aforesaid records having been delivered to the Court at 2:00 p.m. on June 25, 1973, and neither the plaintiffs' attorney nor a questioned document examiner having examined said records from said date to the date this matter was called for trial on the 10th day of July, 1973, and the Court having ordered on the 25th day of June, 1973, that the motions of the plaintiffs' attorney with respect to striking the notice of trial, vacating the pre-trial order and cancelling the trial date having been denied from the bench and by written order entered by the Court on the 25th day of June, 1973, which written order is of record herein, and the matter having come on regularly for trial on the 10th day of July, 1973, the defendants, Mt. Sinai Hospital, Inc., and Dr. Herbert A. Oxman, appearing by their attorneys, Fulton, Menn & Nehs, by John Menn, and the defendants, Dr. Richard L. Franklin and Dr. Walter Hogan, having appeared personally in court and by their attorney, Robert C. Watson, and the defendants, Dr. Irvin M. Becker and Dr. Henry M. Goldberg, having appeared, Dr. Irvin M. Becker personally in court, and

by their attorney, Robert C. Watson, and the defendants, Dr. Irvin M. Becker and Dr. Henry M. Goldberg, having appeared, Dr. Irvin M. Becker personally in court, and both said defendants by their attorneys, Binder, Zirbel & Howard, by Irving W. Zirbel, and the defendant, Dr. Phillip S. Guzelian, having appeared by his attorney, C. Donald Straub, and all of the defendants having stated they were ready to proceed to trial, and the plaintiffs Walter J. Cukrowski and Helen G. Cukrowski, having not appeared at all, but their attorney, Donald H. Mueller, having appeared, and the Court having called the matter for trial and directed the Clerk to impanel the jury, and the plaintiffs' attorney having stated that he would not present any evidence, and all of the defendants by their attorneys having moved the Court for an order of dismissal because of the unreasonable neglect on the part of the plaintiffs to proceed, and the Court having ordered that the action of the plaintiffs be dismissed because of the unreasonable neglect on the part of the plaintiffs to proceed in the cause against the defendants, NOW, THEREFORE,

IT IS ORDERED, that the motion of all of the defendants to dismiss the complaint of the plaintiffs in favor of all of the defendants because of the unreasonable neglect on the part of the plaintiffs to proceed in the cause against the defendants is hereby granted.

Let judgment be entered accordingly.

Dated at Milwaukee, Wisconsin, this 10th day of July, 1973.

BY THE COURT:

/s/John A. Decker
Circuit Judge

STATE OF WISCONSIN MILWAUKEE COUNTY
: CIRCUIT COURT :

WALTER J. CUKROWSKI,
HELEN G. CUKROWSKI, and
KATHLEEN CUKROWSKI,
Plaintiffs,

v.

Case No. 386-841
JUDGMENT

MT. SINAI HOSPITAL, INC.,
DR. RICHARD L. FRANKLIN,
DR. IRVIN M. BECKER,
DR. WALTER HOGAN,
DR. PHILLIP S. GUZELIAN,
DR. HERBERT A. OXMAN and
DR. HENRY M. GOLDBERG,
Defendants.

The above captioned matter having come on for trial before the Court and a jury presided over by the Honorable JOHN A. DECKER, on the 10th day of July, 1973, and the plaintiffs having failed to proceed with proof and the Court having ordered judgment dismissing the action by reason of the plaintiffs' unreasonable neglect in prosecuting same,

NOW, THEREFORE,

IT IS ADJUDGED AND DECREED, that the defendants and each of them have judgment dismissing the complaint of the plaintiffs together with all causes of action set forth therein.

Dated this 10th day of July, 1973, at 2:05 o'clock P.M., at Milwaukee, Wisconsin.

BY THE COURT:

/s/ Francis X. McCormack
Clerk

/s/ Elmer I. Stiemke
Deputy Clerk

APPENDIX D

STATE OF WISCONSIN

IN SUPREME COURT

August Term 1974 Case No. 389

WALTER J. CUKROWSKI, et al,

Appellants, MOTION FOR REHEARING

v.

MT. SINAI HOSPITAL, INC., et al,
Respondents.

PURSUANT to Section 251.65 of the Wisconsin Statutes, the undersigned, ROWAN, SLABY, MUELLER & ILSE by Donald H. Mueller and SCHELLINGER & DOYLE, S.C. by James A. Baxter, of counsel, attorneys for the appellants herein, do respectfully move the Supreme Court of the State of Wisconsin for a rehearing in the above-captioned matter. Said motion for rehearing is based upon the record and briefs already on file with this Court and upon the affidavit of Dr. E. Clinton Texter, Jr., M.D., which is affixed hereto.

Dated at Milwaukee, Wisconsin this 15th day of April, 1975.

Rowan, Slaby, Mueller & Ilse
324 E. Wisconsin Avenue
Milwaukee, Wisconsin

By: /s/ Donald H. Mueller
Donald H. Mueller of Counsel

Schellinger & Doyle, S.C.
111 E. Wisconsin Avenue
Milwaukee, Wisconsin

By: /s/ James A. Baxter
James A. Baxter of Counsel

AFFIDAVIT

STATE OF ARKANSAS

COUNTY OF PULASKI

E. Clinton Texter, Jr., being first duly sworn on oath, deposes and says:

That he is a physician and surgeon and that his present qualifications are listed in "American Men and Women of Science", 12th edition Physical and Biological Sciences, Volume 6, a photocopy of which is affixed hereto as Exhibit A, and a typewritten reproduction of which is attached hereto as Exhibit B.

That your affiant in 1967 had the following qualifications: Associate Professor of Medicine, Northwestern University Medical School; Northwestern University Medical School; Assistant Chief of Gastroenterology, Clinics, Director of Gastroenterology Training Program, Northwestern University Medical School;

Attending physician, Passavant Memorial Hospital and V.A. Hospital, Chicago; Chief of Gastroenterology Service, V.A. Hospital, Chicago; Member of American Association for Study of Liver Diseases, American College of Physicians, American Gastroenterological Association, American Gastroscopic Society, Chicago Medical Society, Illinois Society of Internal Medicine, and American Society of Internal Medicine;

That your affiant lectured at defendant Mount Sinai Hospital in 1967 on the subject of gastroscopic examinations and gastroenterology. Your affiant left Chicago in 1968;

That your affiant is ready, willing, and able to serve as an expert witness for the plaintiffs herein and has agreed to so serve; and your affiant would have been so willing since May, 1970, if the Court would have permitted plaintiffs to use expert witnesses and permitted the plaintiffs to engage an expert from out of the locality of the defendants;

That it is your affiant's opinion that a layman would not be able to say as a matter of common knowledge that the consequences of the professional treatment of Walter Cukrowski in this action were not those which ordinarily result if due care is exercised; and that it is the affiant's further opinion that there was a failure to exercise that degree of care, diligence, judgment, and skill which was required of them, the defendants, and all of them, having due regard to the state of medical science on and about February 15 and 16, 1967; and that the defendants and all of them neglected the patient at a time when the latter's condition required that he be kept under watchful, knowledgeable care. Your affiant has had transmitted to him the pertinent

medical records of the procedures and postprocedural activities pertaining to Walter Cukrowski at Mount Sinai Hospital, Milwaukee, Wisconsin on February 15 and 16, 1967, to wit: documents labeled attending admission notes; nurses notes; physicians orders; progress notes; and report of operation. It is affiant's opinion that the initial perforation of Walter Cukrowski's esophagus during the dilation on February 15th, 1967, and all the subsequent complications thereafter are of a kind which happened or occurred when the defendant doctors and the hospital, including its staff and nurses, failed to exercise that degree of care and skill which is exercised by the average practitioner in the hospital in the class to which they belong, acting in the same or similar circumstances, geographical area and its attendant lack of facilities being circumstances which I have appropriately considered;

That affiant's opinions herein are expressed to a reasonable degree of medical probability; further, the degree of care, diligence, judgment, and skill which is deemed to have been required to come to such opinion is based upon that degree of care and skill which is exercised by the average practitioner in the class to which the hospital and/or doctors belong, acting in the same or similar circumstances with geographic limitations considered as above; that affiant's knowledge encompasses the circumstances in both Chicago, Illinois, where your affiant practiced in 1967, and Milwaukee, Wisconsin in 1967, and they are substantially the same;

That your affiant has been advised that Walter Cukrowski in his deposition in this action stated he did not know and was not advised to any extent whatsoever of the particular risks and adverse effects possible or probable in connection with a prospective

dilatation of himself with a mosher bag at defendant hospital or anywhere else by any of the defendants; and that is is affiant's opinion, based on the same assumptions, standards, principles, and knowledge underlying affiant's other opinions herein, that such advice is customarily given in such instances in Milwaukee, Wisconsin; and further that a layman could not give such an opinion as a matter of common knowledge.

Executed this 14 day of April, 1975, in Little Rock, Arkansas.

/s/E. Clinton Texter
Dr. E. Clinton Texter, Jr.

ACKNOWLEDGEMENT

STATE OF ARKANSAS

COUNTY OF PULASKI

On this 14th day of April, 1975, before me, the undersigned, a Notary Public within and for the county aforesaid, duly commissioned and acting, came E. Clinton Texter, Jr., a medical doctor, to me well known and the affiant in the affidavit to which this acknowledgment relates, who verified and stated on oath that he gave and executed the affidavit of his own free will, and that it is true, accurate, and complete to the best of his knowledge and belief.

/s/Linda Jane Venden Bosch
Notary Public

My Commission Expires:
11-8-78

Your affiant, E. Clinton Texter, Jr., has present qualifications as follows, listed in "American Men and Women of Science" 12th Edition–Physical and Biological Sciences, V. 6:

TEXTER, (ELMER) CLINTON, JR, b. Detroit, Mich, June 12, 23; m. 49; c. 3. MEDICAL EDUCATION, GASTROENTEROLOGY. B.A. Mich. State Univ. 43; M.D. Wayne State Univ, 46. Res. fel. med, col. med. Cornell Univ, 48-50; asst. resident Goldwater Mem. Hosp, N.Y. Univ, 50-51; instr. sch. med, Duke Univ, 51-53; assoc, med. sch, Northwest. Univ, Chicago, 53-56, asst. chief gastroenterol. clins, 53-55, dir. training prog. in gastroenterol, 55-63, asst. prof. med, 58-61, assoc. prof, 61-68; chmn. dept. clin. physiol, Olen B. Culbertson Res. Ctr, Scott & White Clin, Temple, Tex, 68-72; PROF. MED. PHYSIOL. & BIOPHYS, SCH. MED. & ASST. DEAN SCH. HEALTH RELATED PROF, MED. CTR, UNIV. ARK, LITTLE ROCK, 72-, ASSOC. CHIEF OF STAFF FOR EDUC. & ACTING CHIEF GASTROENTEROL, VET. ADMIN. HOSP, 72- Attend. physician, Passavant Mem. Hosp, 53-68; chief gastroenterol. sect, Vet. Admin. Res. Hosp, 56-63; consult, U.S. Naval Hosp, Great Lakes, 63-68; attend. physician, Cook County Hosp, Ill, 66-68; mem. sr. staff, Scott & White Mem. Hosp, Temple, 68-72; consult, Santa Fe Hosp, Vet. Admin. Ctr, Temple, 68-72; William Beaumont Hosp, Dept. of Army, El Paso, 68- consult. to Surg. Gen, U.S. Army, 70; lectr, Univ. Fla, 69; adj. prof. physiol, Univ. Tex. Southwest Med. Sch. Dallas, 69-72; attend. physician, univ. hosp, Univ. Ark, Little Rock, 72- Ed, Am. J. Digestive Diseases, 56-68. U.S.N.R., 43-46, chief heart sta, U.S. Naval Hosp, St. Albans, N.Y. Med.C, 47-49, Lt.(jg). Am. Physiol. Soc; Am. Gastroenterol. Assn; fel. Am. Col. Physicians; Am. Fedn. Clin. Res; Am. Med.

Writers' Assn. (pres-elect, 72-); Am. Soc. Clin. Pharmacol. & Therapeut. Gastrointestinal physiology and patho-physiology; health care delivery systems. Address: Veterans Administration Hospital, University of Arkansas Medical Center, 300 E. Roosevelt Rd, Little Rock, AR 72206.

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No. 75-319

In the Supreme Court of the United States

OCTOBER TERM, 1974

WALTER J. CUKROWSKI, HELEN G. CUKROWSKI and KATHLEEN CUKROWSKI,

Petitioners,

vs.

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Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

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Respondents.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO WRIT OF CERTIORARI

This is a joint brief of the respondents in opposition to the Petition for a Writ of Certiorari to the Supreme Court of Wisconsin.

SUPPLEMENTAL STATEMENT OF FACTS

The petitioners' brief as well as the record in this case are filled with a number of self-serving statements and affidavits prepared by petitioners' attorney and either signed by him or by his clients, and notarized by him. There are also a number of statements of alleged fact

which have no foundation either in the record or in any other document on file with the Wisconsin Supreme Court.

The following is the time sequence from the record in this case:

1. February 15, 1967: Date of alleged malpractice. (R. p. 5).

2. August, 1969: Plaintiffs retained Attorney Mueller in approximately August, 1969 (R. p. 257, A-Ap. p. 142).

3. February 14, 1970: Papers were delivered to the Sheriff of Milwaukee County February 14, 1970, one day before the statute of limitations expired (R. p. 115, A-Ap. p. 101). Plaintiffs did not file the action in court until February, 1971 (R. p. 1).

4. March 9, 1970: Issues were joined between the defendants Goldberg and Becker and the plaintiffs March 9, 1970 (R. p. 120, A-Ap. p. 105).

5. February, 1970 to September 26, 1972: Plaintiffs took *no* action of record to prosecute their suit from February, 1970, to September 26, 1972 (a period of approximately 29 months), except one deposition to perpetuate the testimony of the plaintiff, Walter Cukrowski on February 9, 1971, and one attempted deposition of the defendant Oxman who was no longer a resident of Wisconsin (R. pp. 144-149).

6. September 11, 1972: The defendants Becker and Goldberg moved the court for an order sustaining their demurrer to the claim of the adult daughter of Walter Cukrowski seeking damages for alleged loss of the society and companionship of Walter Cukrowski, who was alive. Said demurrer was sustained (R. p. 118, A-Ap. p. 104).

7. September 26, 1972: Defendants Becker and Goldberg served all parties with a Notice of Trial (R. p. 120, A-Ap. p. 105).

8. October 30, 1972: Plaintiffs moved the court to strike the Notice of Trial, which motion was denied (R. p. 129, A-Ap. p. 106).

9. January 5, 1973: Trial court conducted a pretrial conference, at which time the court issued a pretrial order scheduling the case for trial as the No. 1 case commencing July 10, 1973 (six months notice) and set a schedule for the exchange of names of expert witnesses (R. p. 131, A-Ap. p. 107).

10. June 25, 1973: Defendants Becker and Goldberg moved the court for an order requiring the plaintiffs to comply with the pretrial order. Plaintiffs filed a motion seeking adjournment of trial date. Court ordered plaintiffs to comply with the pretrial order (R. pp. 185-187, A-Ap. pp. 125-127).

11. July 6, 1973: Plaintiffs filed an application for a Writ of Prohibition with the Wisconsin Supreme Court seeking a stay in the commencement of the trial. The application was denied (R. pp. 197-233).

12. July 10, 1973: Case called for trial and the plaintiffs failed to proceed. The court thereupon dismissed the suit for failure to prosecute (R. pp. 234-246, 278-291, 127-130).

13. Motion to reopen Judgment in trial court, September 11, 1973: Motion by plaintiffs to have the case remanded by the Wisconsin Supreme Court to the trial court for this hearing was denied by the Wisconsin Supreme Court.

14. The decision of Wisconsin Supreme Court, March 28, 1975.

15. April 15, 1975: Motion for rehearing accompanied by affidavit of E. Clinton Texter, Jr.

16. June 3, 1975: Motion for rehearing denied by Wisconsin Supreme Court.

The following is a record of the discovery and pretrial preparation by the plaintiffs:

1. No discovery was noticed, attempted, requested, or conducted of the principal physician defendants, Doctors Becker, Hogan and Franklin at any time from the commencement of the suit in February, 1970, to the date of the trial, July, 1973.

2. No discovery was noticed, attempted or conducted from August, 1969 (the date when the plaintiffs first employed Attorney Mueller) until February 16, 1973 (a period of 41 months) except for one hearing February 9, 1971, when the plaintiffs perpetuated the testimony of the plaintiff, Walter Cukrowski (R. p. 141), and except the attempted deposition of one defendant, a former surgical resident at the hospital, Dr. Oxman, who was no longer a resident of Wisconsin (R. 145-149).

3. A deposition of Eleanor Thompson, R.N., was noticed by the plaintiffs for February 16, 1973, and ordered by the Court to be held April 6, 1973, at 10:00 A.M. (R. p. 141, A-Ap. p. 111). The plaintiffs never conducted the scheduled deposition.

4. A deposition of Michael Elliot, Administrator of Mount Sinai Hospital, was scheduled for March 20, 1973, and ordered by the Court to be held April 23, 1973 (R. p. 161, A-Ap. p. 115). The deposition was conducted. Many

questions were objected to and certified. Plaintiffs' counsel never took any further action to obtain a court ruling on the certified questions.

5. The deposition of Dr. Norbert Enzer was noticed for March 15, 1973 (R. pp. 150, 151). Dr. Enzer was out of the country at the time. Plaintiffs' counsel never rescheduled the deposition.

6. No other deposition other than the above were noticed or conducted by the plaintiffs at any time from August, 1969, to July, 1973.

All references "A-Ap." are to pages of Appellants' Appendix in the Wisconsin Supreme Court. All references "R." are to pages of the Record in that court.

ARGUMENT

1. PETITION FAILS TO DEMONSTRATE SUFFICIENT REASON FOR GRANTING WRIT OF CERTIORARI.

Rule 19 of the Revised Rules of Supreme Court of the United States sets forth the considerations for granting a Writ of Certiorari. It points out in graphic terms that such Writ will be granted "only where there are special and important reasons therefor.

The Supreme Court has held that the purpose of granting such a Writ to review a Judgment of a state court is to be done sparingly and only in the most limited circumstances. The petitioners' brief fails to address itself to any of the legal bases that are required to be considered in determining whether a Writ should or should not be granted.

The Supreme Court stated in *Rice* v. *Sioux City Cemetery*, (99 L ed 897, 901; 349 US 70, 74; 75 S Ct 614) by way of illustration what reason might be determined "special and important" under Rule 19:

> "'Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court'
>
> A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (Magnum Import Co. v. Coty, 262 US 159, 163, 67 L ed 922, 924, 43 S Ct 531; see also Address of Mr. Chief Justice Vinson, before the American Bar Asociation, September 7, 1949, 69 Sup Ct v. vi; Address of Mr. Chief Justice Hughes, before the American Law Institute, May 10, 1934, XI Proc Am Law Inst 313) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. Cf. the classic rules for such avoidance stated by Mr. Justice Brandeis in Ashwander v. Tennessee Valley Authority, 297 US 288, 341, 80 L ed 688, 707, 56 S Ct 466."

The Petition further fails to recognize the policy of the Court in avoiding a function of operating in such a manner as to give trials de novo. This policy was recognized by this court in *Stein* v. *New York*, (97 L ed 1522, 1540-1541; 346 US 156, 181; 73 S Ct 1077) where it is stated:

> "Of course, this Court cannot allow itself to be completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding. But that does not mean that we give no weight to the decision below, or approach the record de novo or with the latitude of choice open to some state appellate courts, such as the New York Court of Appeals. Mr. Justice Brandeis, for this Court, long ago warned that the Fourteenth Amendment does not, in guaranteeing due process, assure immunity from judicial error. Milwaukee Electric R & Light Co. v. Wisconsin, 252 US 100, 106, 64 L ed 476, 480, 40 S Ct 306, 10 ALR 892. It is only miscarriages of such gravity and magnitude that they cannot be expected to happen in an enlightened system of justice, or be

> tolerated by it if they do, that cause us to intervene to review, in the name of the Federal Constitution, the weight of conflicting evidence to support a decision by a state court."

See also, the policy of this Court with regard to findings and practices in a state court, *Michel* v. *Louisiana*, 350 US 91, 96; 100 L ed 83, 90; 76 S Ct 158.

In addition to failing to meet the requirement of the requisite legal standards for a Writ of Certiorari, petitioners also, by their numerous statements of purported fact, failed to "present with *accuracy*, brevity and clearness" (italics ours) the essential matters required in Supreme Court Rule 23 (4). The Rule specifies that failure to do this will be sufficient reason for denying the petition. That denial should take place in this matter.

2. THERE IS NO EVIDENCE THAT FINANCIAL CIRCUMSTANCES CAUSED ANY DELAY.

Petitioners in Question #1 of their Argument attempt to imply that it is impossible for a large segment of middle class Americans to obtain legal representation in the area of malpractice and personal injury claims. Nothing could be further from the truth since it is common knowledge that it is the common practice of the legal profession to handle such cases on a contingent fee basis regardless of the economical status of the client. Petitioners cite no cases or authorities to the effect that they have a constitutional right to delay and prolong litigation simply because it is being handled under a contingent fee.

Nor is there any evidence in the record regarding the fact that petitioners may or may not have financial resources to prosecute the case except again for bare statements by counsel in affidavits. In fact, the deposition of

the plaintiff, Walter Cukrowski, indicated that he was on a pension, his wife was employed as a hospital assistant, his daughter was employed as a hospital assistant, and he had a son who was a medical doctor.

The citation of *Padovani* v. *Bruchausen*, 293 F 2d 546 has no materiality on this point.

3. PETITIONERS WERE NOT DENIED DUE PROCESS OR EQUAL PROTECTION BY THE TRIAL COURT'S REFUSAL TO MODIFY THE PRETRIAL ORDER.

The petitioners imply that the trial court first ordered them to trial and then forbade them from using expert witnesses. In fact, the trial court ordered both sides to disclose the names of their expert witnesses according to a schedule adopted so as to allow plenty of time for pretrial discovery and preparation.

Under the Federal Rules as well as under the decisions of the Wisconsin Supreme Court such a pretrial order was appropriate. The Wisconsin Supreme Court has held that pretrial conferences should be held and orders issued based upon them. See *Schneck* v. *Mutual Service Cas. Ins. Co.*, 18 Wis 2d 566, 573; 119 NW 2d 342; and *Fredrickson* v. *Louisville Ladder Co.*, 52 Wis 2d 776; 191 NW 2d 193. In the *Fredrickson* case the Supreme Court particularly pointed out the power of the trial court to compel disclosure of the names of expert witnesses by pretrial order. It pointed out that the penalty for failing to do so could well be the exclusion of the expert(s)' testimony within the discretion of the trial judge.

Even without a provision for expert witness testimony petitioners could have proceeded to trial without the requirement of an expert witness using any of three legal

tools available to them at that time in the State of Wisconsin. They could have proceeded on the doctrine of *res ipsa loquitur* as set forth in the case of *Fehrman* v. *Smirl*, 20 Wis 2d 1; 121 NW 2d 255; 122 NW 2d 439. They could have proceeded under the doctrine of informed consent under the rule of *Trogun* v. *Fruchtman*, (1973) 58 Wis 2d 569; 207 NW 2d 297. Finally, petitioners could have proceeded by the use of learned treatises under the decision of *Lewandowski* v. *Preferred Risk Mut. Ins. Co.*, 33 Wis 2d 69; 146 NW 2d 505.

Petitioners also could have used the "national standards" doctrine of medical evidence recognized to exist by the Wisconsin Supreme Court in the case of *Schier* v. *Friedman*, 58 Wis 2d 269, 281-283; 206 NW 2d 166; 208 NW 328.

Furthermore, petitioners had three weeks between the *Schier* decision and the date by which they were to furnish their expert(s)' names. The affidavit on rehearing in the Wisconsin Supreme Court showed that Dr. Texter was available and could have testified either on the "locality standard" or on the *post-Schier* standard. Petitioners offered no explanation why they did not present his name.

The following excerpt from the Wisconsin Supreme Court opinion accurately shows the state of the record at the time the exclusionary Order was entered:

> "At the hearing on June 25, 1973, counsel for the plaintiffs argued to the trial court that the *Shier* case now enabled him to obtain medical experts to testify whereas his attempts to obtain a medical expert in the Milwaukee area had been unsuccessful. At no time did counsel indicate that he had any specific witnesses in mind or that he was in contact with any such witnesses. The trial court responded, in effect, that without more specific information as to who the plaintiffs

> intended to call, and when the plaintiffs would be ready for trial, he would not extend the trial date or relieve the plaintiffs of the obligation to notify the defendants of the experts' names as provided in the pretrial order."

As can be seen, the trial court all but begged petitioners' attorney to furnish him some basis for according him relief.

4. DEMURRER WAS MOOT SINCE TIME FOR APPEAL HAD RUN.

An order sustaining the demurrer to the complaint of Kathleen Cukrowski was entered September 11, 1972 (A-Ap. 104, R. 118). Under Wisconsin Statutes 2d 274.01, cited at Page 5 of petitioners' brief the appeal time extended no longer than six months. This was an appealable order from which no timely appeal was taken. The Wisconsin Supreme Court has held such an order to be appealable such as stated in *Last* v. *Puhler*, 19 Wis 2d 291, 293; 120 NW 2d 120, stating at Page 293:

> "Hallows, J. The order sustaining the demurrer and dismissing the complaint amounts to a final determination of the rights of the parties to the action and therefore is in effect a judgment and appealable. Sec. 270.53 (1), Stats. An order dismissing the complaint may be treated by this court as a judgment. *State* v. *Donohue* (1960), 11 Wis 2d 517; 105 NW 2d 844. See *Russell* v. *Johnson* (1961) 14 Wis 2d 406, at page 412, footnote 7, 111 NW 2d 193; *State* v. *Eigel* (1933) 210 Wis 275; 246 NW 417."

There is no need to discuss this matter before the Wisconsin Supreme Court since no timely appeal was taken.

5. NO EVIDENCE TO SUPPORT CONTENTION THAT ALLEGED SETTLEMENT OFFERS WERE USED BY COURTS AGAINST PETITIONERS.

In Questions #4 and #5, petitioners again cited matters which have no basis in the evidence or the record of this case apart from their own self-serving affidavits. These matters involve reference to alleged settlement offers. The inference is then drawn by counsel for petitioners that these alleged settlement offers were used as some sort of a club or wedge to compel settlement or dismissal. There is absolutely nothing in the record of this case at the trial level or at the appellate level to justify such an inference.

CONCLUSION

It is respectfully submitted that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

RESPONDENTS' SUPPLEMENTAL STATEMENT OF FACTS

The respondents allege that their opposition has set forth facts without record foundation, without specificity but with imputation of the same by juxtaposition to a rehash of portions of petitioners' statement of facts. Petitioners could requote the lower court's opinion on the unpaid $25,000 services performed by petitioners' counsel as facts considered by that court, but such would only be a restatement of the trial and lower appellate court record. Appendix p. 130-151, Record p. 247-264.

REPLY TO RESPONDENTS' ARGUMENT

(Numbered as in Respondents' Brief)

1 - and 2

It appears that Respondents consider the issues merely to be either "scholarly" or "of benefit only to Petitioners", and that inability to pay counsel currently could not affect the case.

Query, if merely scholarly;

Would the American Bar Association be looking for a solution with its Special Committee on Prepaid Legal Services?

Would an entire issue, (V. II No. 2) of Trial, The National Legal Newsmagazine of the Association of Trial Lawyers of America, be devoted to a solution?

Would the Staff Director of said A.B.A. Committee write in said issue of Trial, supra, at page 12:

> "The OEO Legal Services Program (of the "War on Poverty") has been aptly described as the most massive example of a closed panel system of prepaid legal services in existence. The development of systems for the poor is *especially significant since it produced the anomaly of many persons in the poverty class having more availability of legal services than their allegedly more fortunate brothers in the lower reaches of the middle class.*"

and in another article in the same issue of Trial, *supra,* at page 30, (Re: Insured plans):

> Self-insured "plans may simply refuse to pay for services when the fund is financially exhausted. When such an event occurs, the purpose of the fund is obviously frustrated. The helpless consumer is either left without services for which he has paid dues or the service provider, the lawyer, must work without payment of his fees. *Both of these alternatives are disastrous.*"

At least the American Bar Association realizes, even though defendants do not, that the unfunded contingent fee contract is no solution for 128 million middle income Americans with a large case.

Respondents suggest for the first time on responding to this petition that this case could have been tried without any expert witnesses, "as res ipsa loquitur case". This is a false statement of the record; see the Petition for writ, Appendix D, page 3d, Dr. E. Clinton Texter:

> "That it is your affiant's opinion that a layman would not be able to say as a matter of common knowledge that the consequences of the professional treatment of Walter Cukrowski in this action were not those which ordinarily result if due care is exercised;"

Respondents also suggest for the first time that this case could have been tried without an expert "under the doctrine of informed consent". This is a false statement of the record; see the Petition, App. D, *supra,* at 5d:

> "It is affiant's opinion - - - that such advice is customarily given in such instances in Milwaukee, Wisconsin; and further that a layman could not give such an opinion as a matter of common knowledge."

Respondents also suggest for the first time that the case could have been tried without expert witnesses by the use of learned treatises. One prerequisite in the case they cite, *Lewandowski vs. Preferred Risk Mut. Ins. Co.,*

33 Wis. 2d 69; 146 NW 2d 505, is that an expert witness should testify that the source is reliable authority.

The Respondents further imply for the first time that Petitioners kept secret the name of Dr. E. Clinton Texter from the Trial Court. When it is recalled that experts' names were to be exchanged on *May 11, 1973* and use of Dr. Texter was clearly first authorized by *Schier vs. Friedman,* 58 Wis. 2d 269, 206 NW 2d 166, which was published in an advance sheet on *May 10, 1973,* the absurdity of Respondents' argument is clear, particularly in view of the peripateticity of Dr. Texter's residence; see Appendix 6d to Petition.

Petitioner (daughter) timely appealed to Supreme Court of Wisconsin.

The Respondents argue for the first time (Brief in opposition to writ, page 11):

> "There is (sic-was) no need to discuss this matter before the Wisconsin Supreme Court since no timely appeal was taken."

Such argument now can only be characterized as an intentional misstatement of Wisconsin law, or at very least a grossly negligent misstatement of such law. In this petition for a Writ of Certiorari to the Supreme Court of Wisconsin, page 15, there appears the following statement:

> "She timely appealed from the judgment against all your petitioners, Wisc. Stat. 274.01, Sawejka vs. Morgan, 1972, 56 W 2d, 70, 74, 201 NW 2d 528."

Sawejka, supra, holds — Headnote 1:

> "Timely appeal to the supreme court from a judgment entered on an order sustaining demurrer to a complaint conferred jurisdiction on the supreme Court notwithstanding failure to appeal from the order, albeit this itself was appealable, because the judgment brought up for review the order sustaining the demurrer upon which it was based. pp. 73, 74."

If there had been no timely appeal the lower court would have so disposed of her appeal instead of in the unconstitutional method utilized.

No Evidence In Record?

For the first time, and in Reply to this Petition, Respondents contend in direct opposition to their position before the Supreme Court of Wisconsin, that there is no evidence in support of Petitioners' Questions 4 and 5.

Before the trial and lower appellate courts, the existence of the evidence was conceded, and Respondents drew conclusions therefrom; for instance, in their Respondents' Brief before the Supreme Court of Wisconsin (Pages 5-6):

> "The appellants, however, make the emotional claim that the defendants offered various sums of money in settlement and that the plaintiff, Walter Cukrowski, has large medical bills, and that if the case is affirmed on appeal, he will have lost this pot of money that he *otherwise certainly would have received.*", (Italics mine).

The defendants have never previously challenged the existence of their written settlement offers, referred to

at the trial court level. App. 138, Rec. 254; App. 158, Rec. 281-2.

CONCLUSION

It is respectfully submitted, that the Petition for a writ be granted.

Respectfully submitted,

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